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No. 91-1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BERNARD KEENER,

Petitioner,

v.

HOECHST CELANESE CORPORATION a/k/a CELANESE PLASTICS COMPANY, a/k/a CELANESE PLASTICS COMPANY, a division of CELANESE CORPORATION f/k/a CELANESE CORPORATION AND HOECHST CELANESE CHEMICAL GROUP, INC. a/k/a CHEMICAL GROUP, f/k/a CELANESE CHEMICAL COMPANY, INC. a/k/a HOECHST CELANESE CHEMICAL COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

By concluding that Petitioner was arguably engaged in protected concerted activity within the exclusive jurisdiction of the NLRB, did the court of appeals decide a federal question in a way that conflicts with applicable decisions of this Court?

PARTIES

There are no parties to the proceeding other than those contained in the caption of the case in this Court.

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Statement of the Case

Petitioner claims that he was discharged from his employment in retaliation for voicing concerns about working conditions. On the day in question, Plaintiff and several co-workers were required to remove and dispose of fly ash bags. Plaintiff testified in his deposition that he and several co-workers were concerned about their exposure to the fly ash and discussed these concerns among themselves. Because

of his longer tenure with the employer, Petitioner testified that his co-workers looked to him to bring the matter up with management. During the course of the day, Petitioner testified that he approached his supervisor several times, advised him that he and his co-workers were concerned about their working conditions and asked if conditions and procedures could be altered. Unable to obtain a satisfactory response from his supervisor, Petitioner later telephoned the employer's personnel manager and complained to her. The following day, Petitioner was discharged.

The district court concluded that Petitioner was arguably engaged in protected concerted activity and that the question of whether Plaintiff had in fact been discharged in retaliation for engaging in such conduct lay within the exclusive jurisdiction of the National Labor Relations Board. On appeal, the Fifth Circuit affirmed in an unpublished opinion.

Reasons for Denying the Writ

The decision of the court of appeals is consistent with applicable decisions of this Court.

Section 7 of the National Labor Relations Act protects not only employees' right to join labor organizations and engage in collective bargaining, § 7 also grants to employees the right "to engage in other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157.[1] Section 8 of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their § 7 rights. 29 U.S.C.

[1] Section 7 is set forth in relevant part at p. 3 of the Petition for Writ of Certiorari.

§ 158(a)(1).[2] Section 10 of the NLRA grants exclusive jurisdiction to the NLRB to hear and determine unfair labor practice cases under the Act. 29 U.S.C. § 160(a).[3]

It is not for the Court to determine whether Petitioner's activity was *in fact* protected concerted activity within the meaning of § 7. Under the statute, only the NLRB, subject to judicial review, may make such a determination. "We have often reaffirmed that the task of defining the scope of § 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it,' *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978), and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference, *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944)." *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829-30 (1984). If the Court determines that Petitioner's activity was *arguably* protected by the Act, then it must defer to the exclusive jurisdiction of the NLRB. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . " *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

"Arguably" does not mean that the party claiming preemption must conclusively establish that the NLRB *would* find a violation. Rather, "arguably" means only

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[2] Section 8 is set forth in relevant part at p. 3 of the Petition for Writ of Certiorari.

[3] Section 10 is set forth in relevant part at pp. 3-4 of the Petition for Writ of Certiorari.

that the party claiming preemption must advance a reasonable interpretation of the Act which has not been authoritatively rejected by the NLRB or the courts. "The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation." *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 395 (1986).

Applying these principles to the present case, it is clear that Petitioner was engaging in conduct which was at least *arguably* protected concerted activity under the Act.

In *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975), the Board held that a lone employee was engaged in protected concerted activity within the meaning of § 7 when he lodged a complaint under a safety statute designed for the protection of employees generally. The Board reasoned that inasmuch as safe working conditions were matters of concern to all employees, one employee acting alone to obtain statutory compliance would be presumed to be acting on behalf of all other employees. "Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted." *Id.* at 1000.

In *Meyers Indus., Inc.*, 268 N.L.R.B. 493 (1984), *remanded sub nom Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 474 U.S. 948, 971 (1985), the Board retreated from its *Alleluia Cushion* rationale, holding that there is no § 7 "concerted activity" when an employee makes a statutory safety complaint unless

he acts with or on the authority of other employees. "In general, to find an employee's activity to be 'concerted', we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Id.* at 497. On appeal, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Board to more fully explain its rationale in light of the Supreme Court decision in *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984). In essence, the District of Columbia Circuit was questioning whether there were not occasions when the activity of a single employee could constitute concerted activity within the meaning of § 7. On remand, the Board stated in relevant part: "There is nothing in the *Meyers I* definition that states that conduct engaged in by a single employee at one point in time can *never* constitute concerted activity within the meaning of Section 7. On the contrary, the *Meyers I* definition, in part, attempts to define *when* the act of a single employee is or is not 'concerted.' " *Meyers Indus., Inc.*, 281 N.L.R.B. 882, 885 (1986), *aff'd sub nom Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988). The Board then went on to discuss and explain its historic position that a single employee is engaged in concerted activity when he acts, formally or informally, as a spokesman for one or more other employees. *Id.* at 885-887.

In *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 this Court held that a lone employee's refusal to engage in what he considered to be an unsafe act was protected concerted activity where such refusal was arguably authorized by a collective bargaining agree-

ment. In so holding, this Court reiterated that while concerted activity clearly encompasses two or more employees working together at the same time and place toward a common goal, "the language of § 7 does not confine itself to such a narrow meaning." *Id.* at 831. Both the majority opinion and the dissent emphasized that a single employee acting alone may be engaged in protected concerted activity if he does so "as a representative of at least one other employee." *Id.* "An employee certainly engages in 'concerted activity' when he acts . . . on behalf of one or more . . . employees." *Id.* at 846 (O'Connor, J., Powell, J., and Rehnquist, J., dissenting).

In order for a single employee to act as a representative on behalf of other employees, it is not necessary that he be formally chosen or designated. A vague, unspoken understanding or awareness that one employee may take whatever action he deems appropriate is sufficient to deem that person as a spokesman for the group. *Meyers Indus., Inc.*, 281 N.L.R.B. at 886 (unnecessary for spokesman to be "specifically authorized" by group); *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1355 (3d Cir. 1969), *cert. denied*, 397 U.S. 935 (1970) ("spokesman may be a voluntary one or a chosen representative"); *NLRB v. Guernsey-Muskingum Elec. Coop., Inc.*, 285 F.2d 8, 12 (6th Cir. 1960) ("mere fact that the men did not formally choose a spokesman . . . does not negative concert of action"); *Walter Brucker & Co., Inc.*, 273 N.L.R.B. 1306 (1984) ("specific authorization" of spokesman unnecessary, where more senior employee volunteered to approach management and junior employee was only generally aware that senior employee would take whatever action he deemed necessary).

When Petitioner elected to act not only on his own behalf, but also as a spokesman for his co-workers, he elevated his conduct to a plane beyond local state interest. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. at 245.[4] Moreover, Petitioner is clearly in error when he argues that protected concerted activity is a mere peripheral concern of the NLRA. Indeed, protection of the right to engage in concerted activity for mutual aid or protection has been described by this Court as one of "the most fundamental purposes of the Act." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 261 (1975). In *Weingarten*, this Court pointed out that § 1 of the NLRA "declares that it is a goal of national labor policy to protect" and foster this right. *Id.* at 261-62. This Court has repeatedly emphasized that "Congress knew well enough that labor's cause is often advanced on fronts other than collective bargaining" and, consequently, fashioned § 7 to protect

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[4] Thus, Petitioner's reliance upon *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988) and *Jones v. Roadway Express, Inc.*, 931 F.2d 1086 (5th Cir. 1991) is misplaced. Both *Paige* and *Jones* involved the question of contractual preemption under § 301 of the Act, 29 U.S.C. § 185. In this regard, *see Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). More appropriate to the case *sub judice* is the recent decision of the United States Court of Appeals for the Eighth Circuit which held that an employee's safety claim under state law is preempted if it arguably falls within the exclusive jurisdiction of the NLRB. *Platt v. Jack Cooper Transp. Co., Inc.*, 959 F.2d 91 (8th Cir. 1992).

concerted activities not only for collective bargaining but also for the broader purpose of "mutual aid or protection." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). To limit the protection of § 7, as Petitioner suggests, to rights associated with union representation or collective bargaining would "frustrate the policy of the Act to protect the right of workers to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

Conclusion

Assume, for the purposes of argument, that Plaintiff and his co-workers had concertedly walked off the job in protest of their working conditions. Let us assume further that they were summarily discharged for engaging in such conduct. Clearly, the Court would have little difficulty in concluding that the conduct in question was protected concerted activity within the exclusive jurisdiction of the NLRB. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). It matters not that the concerted activity in this case took a different form, *i.e.* Petitioner acting alone as a representative on behalf of his co-workers who looked to him to bring the matter up with management.

Where, as here, the activity in question arguably is protected by § 7, resolution of the issue and the fashioning of the appropriate remedy should be deferred to the NLRB, the agency established by Congress for this express purpose. "Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the ex-

clusive federal regulatory scheme." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. at 247.

The district court and the court of appeals correctly concluded that Petitioner was *arguably* engaged in protected concerted activity and that the question of whether Petitioner had *in fact* been discharged for engaging in such conduct lay within the exclusive jurisdiction of the NLRB. In so deciding, the lower courts did not decide a federal question in a way that conflicts with applicable decisions of this Court. Consequently, the petition for writ of certiorari should be denied.

Respectfully submitted,

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